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Institutional Control Implementation:

Land Acquisition and Title Review Considerations

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I Objectives: In this training material you will learn ...

What is meant by "title to land";

Why it is important to review title when acquiring land;

Why is it <u>required</u> that title be reviewed and approved in all federal land acquisitions – the statutory mandate of 40 U.S.C. § 3111;

Who reviews titles for federal acquisitions, and by what guidelines;

What is title evidence and who can prepare it;

Why the government gets title insurance;

Schedule B exceptions in a title commitment – what do you do about them;

How to prepare a Certificate of Possession and Inspection;

What materials are required to request a preliminary title opinion, and then a final title opinion?

II Title to land:

a. Title is the means whereby the owner of lands has the just possession of his property.

b. The union of all the elements which constitute ownership.

c. The right to or ownership in land.

d. The evidence of right which a person has to the possession of property.

e. Think of title as a bundle of sticks. The fee owner holds the bundle and all rights in the land that the bundle represents, except for those he may have given away. For example: maybe he gave one stick – a utility easement – to the local power company.

III Why review title?

a. To make sure you are getting the ownership/title you think you are getting;

b. To make sure you are paying the right person; and

c. To identify all encumbrances or other interests in the land – such as utility easements, mortgages, and liens, which could possibly give the holders of those interests certain rights that are not compatible with your IC's.

d. As a practical matter, a title review is a very important part of every land

acquisition – not just federal land acquisitions – but it is required by statute (40 U.S.C. § 3111) for federal land acquisitions.

IV Statutory and regulatory responsibility and authority for federal land acquisitions

This is not new. The Attorney General was charged with the responsibility of reviewing titles **for federal land acquisitions** over 160 years ago. This law is found today at 40 U.S.C. § 3111 (formerly 40 U.S.C. § 255).

40 U.S.C. § 3111 reads in pertinent part as follows:

> Public money may not be expended to purchase land or any interest in land unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the Federal Government is acquiring the property.
>
> The Attorney General may delegate the responsibility under this section to other departments and agencies of the Government, subject to general supervision by the Attorney General and in accordance with regulations the Attorney General prescribes.

The first paragraph speaks of the "purchase" of land. This has been interpreted very broadly to include acquisitions by purchase, donation, exchange – all acquisitions of land or interests in land by whatever means, except by descent. The statute applies to acquisitions of "land or any interest in land". "Interest in land" includes easements and forms of Institutional Controls that are deemed to be interests in land. It also includes long term leases of more than 30 years.

EPA does not have delegated authority to review titles under 40 U.S.C. § 3111, so title reviews for EPA must be done by either the Department of Justice or by the Corps of Engineers, which has a unique delegation to do title reviews for other agencies.

V DOJ title related regulations and guidelines

Attorney General's title regulations: Created in 1970, these regulations reflect the

practices of the Department of Justice in reviewing titles. They have been amended only twice – in 1974 and in 1990. These regulations are not published, but a copy may be obtained by

contacting Lew Baylor - see p. 1 of this outline for contact information.

Title Standards 2001: Incorporated by reference as part of the Attorney General's title regulations, the *Title Standards 2001* were adopted on December 29, 2000, by the Assistant Attorney General, Environment and Natural Resources Division, to replace the *Standards for the Preparation of Title Evidence in Land Acquisitions by the United States* (1970). A copy of the *Title Standards 2001* may be found on the Department of Justice web page at http://www.usdoj.gov/enrd/title.htm.

A Procedural Guide for The Acquisition of Real Property by Governmental Agencies: This is an old but still useful booklet published in 1972. It discusses common procedures used in federal land acquisitions. Many agencies have used it as the basis for their own more detailed internal land acquisition procedural guidance document. Included later in this paper are checklists drawn from the Procedural Guide..

VI Highlights of the *Title Standards 2001* – what title evidence is acceptable to the government

1. Ordinarily, when the federal government is acquiring land or an interest in land, the acquiring agency is responsible for securing the title evidence. While there are a number of different forms of title evidence that are acceptable under the *Title Standards 2001*, in practice, title insurance is the most convenient, and usually the most economical form of title evidence available. The government uses title insurance as its title evidence in about 95% of all its land acquisitions.

2. When title insurance is to be obtained, the initial title evidence is called a title commitment, binder or report. No special form is required for federal land acquisitions. The commitment is issued prior to the acquisition. After the land has been acquired, the title insurance policy is issued. For federal land acquisitions it must be on a special American Land Title Association (ALTA) U.S. Policy - 9/28/91 form, in all jurisdictions except Texas. In Texas the procedure is somewhat different, and the government requires a title insurance policy form identified as Texas Land Title Association (TLTA) U.S. Policy T-11. Both policy forms are discussed in detail in the *Title Standards 2001*.

3. Who can prepare title evidence? Guidelines are provided, and it is up to the acquiring agency to satisfy itself that it's provider of title evidence is qualified.

Agencies will want to review their contracting procedures to take this into consideration.

4. What are the requirements for the length (time period) of the search? In most cases this is not a significant consideration since agencies usually get title insurance -- which does not normally limit its coverage to any particular period of time. However, it may be useful as a cost saving consideration to note that for the acquisition of easements valued at $5,000 or less, a less expensive last owner search is acceptable.

5. What about liability limits or the amount of title insurance coverage? The *Title Standards 2001* does not require an agency to secure title insurance in the full amount of the purchase price (although doing so is certainly acceptable, and sometimes may be necessary). The formula for calculating the minimum liability limit for a title policy is 50% of the first $100,000 of liability or coverage, plus 25% of that portion of value in excess of $100,000.

6. The acquiring agency should physically inspect the land and prepare a Certificate of Inspection and Possession (CIP). Such an inspection can independently reveal evidence of possible rights of others in the subject land that might not be revealed by a search of the land records. A CIP is essential to a proper review of title.

   Whenever possible an inquiry and physical inspection of the land should be made early in the acquisition process, but in any event, an inspection must be conducted immediately prior to the closing of the purchase, and a CIP must be submitted as part of the title evidence with the request for a final opinion of title. There are two forms of CIP specified for use in the *Title Standards 2001*. Other forms of CIP are not acceptable.

   If the inspection and inquiry reveals a possible interest or claim of any person other than the record owner, further inquiry is required to fully identify the nature and scope of the interest or claim, and whether, under the circumstances of the acquisition, the interest will interfere with the contemplated use of the land. Measures may have to be taken to eliminate claims which are not compatible.

7. The *Title Standards 2001* includes requirements for the Deed to the United States. For example: When the government is acquiring an interest in the land, the conveyance document (deed, easement, etc.) must name the United States of

America as the Grantee – not EPA – although EPA should be identified elsewhere in the document as the agency exercising administrative authority over the interest

acquired.

8. The *Title Standards 2001* includes information on the function of title evidence in federal condemnation cases, with procedural guidance.

9. There is a section to address unique procedures used in Texas.

VII Summary of the provisions of the Attorney General's title regulations.

The Attorney General's title regulations will be of interest to those in the acquiring agency who are negotiating the acquisition, as well as to those who are reviewing the title. I will highlight the sections of the regulations as follows:

1. Approval of title prior to the payment of the purchase price. Title must be approved, and any title matters which might defeat or adversely affect the interest of the United States must be eliminated, prior to acquisition.

2. Title evidence. Title evidence that is in reasonable compliance with the *Title Standards 2001* must be obtained.

3. Conveyances by corporations. When a corporation, partnership or other similar entity will convey the interest in land to the government, proof of the validity of its corporate/legal existence and authority to convey is required, except when the title evidence is a title insurance commitment/policy.

4. Authority to acquire lands. The authority of an agency to acquire land must be clearly identified. Such authority may be explicit or implied. Any conditions of the authority must be satisfied, such as securing state agreement as required under CERCLA 104(j).

5. Character of title which may be approved. The interest to be acquired must be sufficient for the purpose for which it is being acquired. It is the responsibility of the reviewing attorney to understand the intended purpose of the acquisition. An ordinary utility easement revealed in Schedule B of the title commitment may or may not be a problem – for example: what if it gives the holder a right to install, maintain and replace an underground cable, and your institutional controls forbid

digging? You may feel such an easement is a problem and must be either relocated and released, or subordinated, so that no digging will take place at all, or

only if specifically approved by EPA. When permanent improvements are planned for land, a defeasible title is not sufficient and may not be approved. Covenants, conditions and restrictions that would limit the use or conveyance of the land are not acceptable and must be eliminated. When land is donated to the United States for use for specified purposes, a right of reverter may be retained and will be acceptable, provided it will terminate upon the expenditure of funds for the construction of the project. When no improvements are planned for land, a defeasible title may be approved if certain requirements are satisfied. Any time it is desired to acquire land subject to a right of reversion, the title review must be referred to the Attorney General (i.e. to the Land Acquisition Section at the Department of Justice).

6. Taxes and assessments and other liens. If the interest in land being acquired is fee simple, all liens must be released, and all taxes must be paid through the date of closing. Your agency is responsible for identifying and seeing to the payment of taxes so that the land will be tax exempt after closing. I also caution you to be alert to private assessments such as those often found in covenants for residential or office park subdivisions for common area maintenance. Land acquired by the United States is typically not exempt from such assessments, so provision must be made to secure a release of record.

For the acquisition of easements, *and for this purpose Institutional Controls may be considered to be easements*, titles may be approved subject to the lien of the current taxes, if they are not due and payable, without any provision for the payment of such taxes if the purchase price of the easement is not in excess of 50 percent of the reasonable value of the entire contiguous property of the vendor. Title to easements may be approved subject to outstanding encumbrances, such as mortgages, deeds of trust and vendors' liens, where the properties are not encumbered in excess of 50 percent of their reasonable value and the considerations being paid for the easement do not represent sums in excess of 10 percent of the value of the tract.

7. Deed to the United States. The *Title Standards 2001* lists a number of requirements for the deed or the conveyance document to the United States, a couple of the more fundamental of which are:

a) title is conveyed to the “United States of America and its assigns”, not to the acquiring agency;

b) negotiators should always call for a conveyance by a general warranty

deed, and if the vendor refuses, they will have to justify to the reviewing attorney why he/she should approve any other type of conveyance.

8. Final title procedure and evidence. Title must be searched right up to the date and time of recording of the deed to the United States to be sure there are no recently recorded matters that could affect the title. The report issued to confirm this update is the final title evidence. Usually it will be a title policy on the required government policy form.

9. Waivers. Waivers may be granted to permit the acquisition of land when the title is not in conformity with the title regulations. Authority to grant waivers has been reserved personally to the Assistant Attorney General, Environment and Natural Resources Division.

VIII Checklists for requesting preliminary and final title opinions:

The procedure used for reviewing and approving titles, as outlined in the *Procedural Guide for the Acquisition of Real Property by Governmental Agencies*, involves the issuance prior to acquisition of a preliminary title opinion; and the issuance after the acquisition of a final title opinion. The preliminary title opinion will reveal the status of title and set forth certain conditions and requirements. If the title is acceptable to acquiring agency, and if the conditions and requirements have been/can be satisfied, closing may take place and the consideration may be paid. The final opinion is then requested to confirm that title is vested in the United States and that all of the conditions and requirements have been properly addressed.

The following checklists are drawn from the *Procedural Guide for the Acquisition of Real Property by Governmental Agencies*. Your agency may have additional requirements.

1. A purchase assembly **REQUESTING A PRELIMINARY OPINION** of title should include:

   A. A letter transmitting the purchase assembly, properly signed by an authorized official of the agency, which contains:

      1) A request for a preliminary opinion of title;
      2) A statement identifying the property by number of acres, parcel number, the name of the project for which it is being acquired, its

location by city, county, and state, the name of the vendor, and the consideration to be paid for the property;

3) A citation of the pertinent authorization and appropriation acts; and
4) Any additional comment of information which may be helpful in considering the sufficiency of the title.

B. Any accepted option: an executed sales, donation or exchange agreement; or correspondence constituting an offer and acceptance.

C. Title evidence complying with the requirements set out in the *Title Standards.*

D. A map or plat of the land to be acquired, if available.

E. A Certificate of Inspection and Possession, if available.

F. A copy of the draft of the deed (easement, conveyance, etc.) to the United States, if available.

2. A completed purchase assembly **REQUESTING A FINAL OPINION** of title should include:

A. A letter transmitting the completed purchase assembly, properly signed by an authorized official of the agency, which contains:

1) A request for a final opinion of title;
2) A statement identifying the property by number of acres, parcel number, the name of the project for which it is being acquired, its location by city, county, and state, and the name of the vendor;
3) A statement explaining how each objection or requirement set out in the preliminary title opinion, or subsequently disclosed by a continuation search, has been met; and
4) A certification that the encumbrances that remain on the title will not interfere with the contemplated use of the land.

B. All data constituting the contract of sale, donation or exchange,

C. A plat or map of the property if available;

D. Original or copy of the final title evidence (usually a title insurance policy),

E. Original or a true copy of the deed (easement, conveyance, etc.) to the United States, showing the clerk’s recordation stamps;

F. Certificate of Inspection and Possession extended to the date of closing and accompanying executed disclaimers, if any;

G. Vendor's receipt for the purchase money; itemized closing statement; and the vendor's commitment or performance bond, if any, assuring the clearance of the site;

H. Miscellaneous and related documents, such as affidavits, copy of pertinent portions of articles of incorporation, resolutions authorizing sale, certifications as to corporate standing, and all other related data obtained to show the elimination of the objections and the meeting of the requirements contained in the preliminary title opinion.